



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

September 19, 1990

Mr. Paul T. Curl
Attorney for Fiesta
San Antonio Commission
Murray, McClenahan & Sparr
1900 NBC Bank Building
430 Soledad
San Antonio, Texas 78205

Open Records Decision No. 569

Re: Whether the Fiesta San
Antonio Commission is subject
to the Open Records Act,
V.T.C.S. art. 6252-17a
(RQ-1941)

Dear Mr. Curl:

The Fiesta San Antonio Commission received a request under the Open Records Act, V.T.C.S. art. 6252-17a, for information about a League of United Latin American Citizens (LULAC) sponsored parade, including information on parade seat ticket distribution, collection and accounting procedures, and concession sales and expenses. As attorney for the commission, you referred it to this office for a ruling under section 7 of the act, and the Open Records Section of this office responded with Open Records Letter Ruling OR89-242 (1989). This letter concluded that the Fiesta San Antonio Commission was a governmental body within sections 2(1)(C) and 2(1)(F) of the Open Records Act, stating that it was an agency of the city and that it received a "substantial financial benefit" from the city.

You thereupon requested reconsideration of OR89-242, and we determined that the reasoning and conclusions of that ruling should be reexamined in a formal open records decision. Our decision is based solely on the facts that you, the requestor, and the City of San Antonio have provided to us. To the extent the status of the Fiesta San Antonio Commission is affected by information not before us, we cannot finally determine whether or not it is a governmental body within section 2(1)(F). That is a question for the judiciary. See generally Kneeland v. National Collegiate Athletic Ass'n, 650 F. Supp. 1047 (W.D. Tex. 1986), rev'd 850 F.2d 224 (5th Cir. 1988), cert. denied 109 S.Ct. 868 (1989).

The Open Records Act applies to governmental bodies as defined in section 2(1) of article 6252-17a, V.T.C.S. That

definition provides that the following entities, among others, are governmental bodies:

(C) every deliberative body having rulemaking or quasi-judicial power and classified as a department, agency, or political subdivision of a county or city;

. . . .

(F) the part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends public funds. Public funds as used herein shall mean funds of the State of Texas or any governmental subdivision thereof

V.T.C.S. art. 6252-17a, § 2.

You have provided a brief history of Fiesta San Antonio. The first celebration and parade took place in April of 1891 to commemorate the Battle of San Jacinto. Over the years, more parades and events were added to the annual celebration. In 1959, the San Antonio Chamber of Commerce established the Fiesta San Antonio Commission as coordinating agency for the festival. The commission today consists of numerous organizations that sponsor the scheduled events. It underwrites various events including the three major parades and is responsible for coordinating all activities with city, military, and member organizations sponsoring Fiesta events.

The City of San Antonio has adopted an ordinance setting the dates of Fiesta San Antonio for 1988 to 1992 and designating Fiesta San Antonio Commission as the planning and coordinating agency for Fiesta. San Antonio, Tex., Ordinance 66194 (Dec. 3, 1987). Open Records Letter Ruling OR89-242 concluded that this ordinance, taken as a whole, establishes the Fiesta San Antonio Commission as an agency of the city within section 2(1)(C) of the Open Records Act. We will first reexamine this conclusion.¹

1. We will consider this ordinance only in connection with the open records question before us, and we will not reach any other legal issues that it might raise.

The preamble of the ordinance states in part that the Fiesta San Antonio Commission is a non-profit corporation that exists to support Fiesta San Antonio by raising funds to support its activities, allocating these funds among the other organizations sponsoring the events, and coordinating the events and activities of Fiesta. It notes that "without the financial support provided by Fiesta San Antonio Commission from and by means of the permits and licenses granted to it by the City" various major events would be curtailed, and concludes that "the granting of the following specific permits, licenses, and authority to Fiesta San Antonio Commission for and in connection with the support of Fiesta San Antonio for 1988 - 1992" is deemed to be in the public interest. Section 1 of the ordinance states as follows:

Fiesta San Antonio Commission is hereby designated as the official agency of the City of San Antonio for the purpose of planning, coordinating, and providing financial support for the events and activities of Fiesta San Antonio.

San Antonio, Tex., Ordinance 66194, § 1 (Dec. 3, 1987).

Although this provision designates the commission as an agency of the city, the ordinance must be read in its entirety to understand the legal effect of this designation. Section 2 of the ordinance states that the city "will not lease, rent, or permit the use of City-owned facilities or public streets or other facilities where a City permit is required for any carnival, parade, or other Fiesta type event during the period of Fiesta . . . without the approval in writing of the Fiesta Commission at least 120 days prior to the first day of Fiesta San Antonio." Thus, we construe section 2 to confer on the commission the first right to rent city-owned facilities needed for Fiesta, and to receive permits for parades and a carnival that are part of the celebration. It is also given a permit to place bleachers and other seating arrangements upon the streets which are the parade routes designated by the city. Id. § 4. The commission may assign the city-granted permits and the right to lease city facilities to its various member organizations and other sponsors of Fiesta events and must provide the city manager with a list of the approved events requiring the use of city-owned facilities, services, or public streets. Id. §§ 2, 3, 7. The commission "is authorized to grant concessions" for the sale of food and souvenirs along the parade route; however, the concessionaires must secure approval from the appropriate city officers for the

locations and time of placement of their stands, and must possess a license or permit from the Metropolitan Health District of the city. Id. § 5.

The ordinance places various other responsibilities on the Fiesta San Antonio Commission and sponsoring organizations, such as providing barricades and traffic signs needed to comply with city standards, paying inspection fees in accordance with city ordinances, cleaning up areas on which Fiesta events take place, and posting a performance bond for clean-up to reimburse the city if clean-up is not properly done. Id. § 2(h),(i). The commission must file a complete financial report of monies received and manner of expenditure during the year.² Id. § 8(c). It is also required to secure insurance coverage in amounts established by the ordinance, to name the city as an additional insured, and to hold harmless and defend any lawsuit filed against the city, its officers, agents, and employees as a result of the privileges granted by the ordinance. Id. §§ 3, 8(b). Finally, section 8(d) of the ordinance provides as follows:

The privileges herein granted may be summarily revoked, wholly or partially, for any breach by Fiesta San Antonio Commission, or any of its assignees, of any provision of this ordinance, or if, in the opinion of the City Council, the exercise of Fiesta San Antonio Commission or any of its assignees of the license and privileges herein granted is contrary to the public interest.

Taken as a whole, the ordinance does not establish the Fiesta San Antonio Commission as an agency of the city. The preamble expresses the city council's understanding that the commission is a private entity that has coordinated fiesta events for a number of years, and the city's intent that the commission continue to carry out this function. The ordinance makes available to the commission the various permits necessary to hold the Fiesta parades and other events requiring use of the public streets, as well as a right to lease city facilities necessary for Fiesta. It further allows the commission to assign the permits and

2. We do not know whether the information that the requestor seeks is available from the financial report filed with the city.

rights to lease to its member organizations and other sponsors of Fiesta events, subject to city review and approval, and other restrictions set out in the ordinance.

The duties imposed upon the commission by the ordinance would not be imposed on an agency or department that is part of the city governmental structure. For example, the requirements that the commission post a performance bond for clean-up, provide its own insurance, and agree to hold harmless and defend any lawsuits filed against the city, its officers, agents, and employees, show that the commission is not an agency of the city, but a separate entity. See, e.g., Civ. Prac. & Rem. Code § 101.021 (governmental liability for torts caused by employees). See generally Morris v. City of Houston, 466 S.W.2d 851 (Tex. Civ. App. - Houston [14th Dist.] 1971, no writ) (suit against city by parade spectators injured by runaway horse). Finally, section 8(d), quoted above, ensures that the city will remain in control of its governmental powers.

We next consider whether Fiesta San Antonio Commission "is supported in whole or in part by public funds, or . . . expends public funds," within section 2(1)(F) of the Open Records Act. When a private entity receives funds from a governmental office, this office has applied various tests to determine whether they are "public funds" within section 2(1)(F). See Kneeland v. National Collegiate Athletic Ass'n, supra, at 228-29 (discussing Attorney General Opinions JM-821 (1987), JM-116 (1983), Open Records Decision Nos. 343, 302 (1982), and 228 (1979)). The threshold question is whether the commission receives any funds from the City of San Antonio.

The ordinance makes it clear that various facilities, such as the convention center and municipal auditorium, are leased from the city by the sponsors of Fiesta events. San Antonio, Tex., Ordinance 66194, § 2 (Dec. 3, 1987). Assuming that the lease transactions involve a "typical arms-length contract . . . between a vendor and purchaser," they would not bring the Fiesta San Antonio Commission within section 2(1)(F). See Kneeland v. National Collegiate Athletic Ass'n, supra, at 228; Attorney General Opinion JM-821 (1987). Open Records Letter Ruling OR89-242 did not in any case rely on provisions involving the lease of city facilities by Fiesta sponsors, but on those involving the placement of bleachers and other seating along the parade route.

Section 4 of the ordinance grants the commission "exclusive permission" to place bleachers, grandstands,

chairs, and other seating on the parade route, subject to numerous conditions, including a provision establishing the maximum charge per seat. The commission owns the bleachers and is responsible for setting them up and taking them down, with city supervision.³ Open Records Letter Ruling OR89-242 suggested that funds received by the commission from the sale of tickets for seating along the parade route were public funds "that would otherwise belong to the City of San Antonio." Open Records Letter Ruling OR89-242 (1989) at 2. The ruling concluded that the ordinance provided a substantial financial benefit to the Fiesta San Antonio Commission.

This conclusion overlooks the well-established constitutional right of people to peacefully assemble or parade, in public streets or other places open to the public generally, subject to reasonable state and municipal regulation. See 7A E. McQuillin, Municipal Corporations § 24.591 (3d ed. 1989). A municipality may also regulate stands put in place to review the parade. Id. § 24.595. In granting a permit to place seating along a parade route, and placing limits on the charge per seat, the city is regulating a use of the public streets by members of the public. Its action in regulating the use of city streets in this manner is not comparable to allowing a profit-making venture to use a city building free of charge. By requiring the commission to get a permit for erecting bleachers and limiting the charge per seat, the city is not granting public funds to the commission, nor do the charges for seats constitute funds of the city. See 43 Tex. Jur. 3d, Highways and Streets §§ 121, 122.

Cities license and regulate various businesses and persons that use the city streets to pursue economic gain, such as taxi drivers, wrecker services, and peddlers. See Utter v. State, 571 S.W.2d 934 (Tex. Crim. App. 1978); Ex parte Heine, 254 S.W.2d 790 (Tex. Crim. App. 1952); Local Gov't Code §§ 215.029 - 215.031; see also V.T.C.S. art. 1175, § 2 (city regulation of use of streets by public utilities such as telephone, electricity, or streetcar

3. A letter in the file from the Director of the San Antonio Parks and Recreation Department to the Executive Vice President of the Fiesta San Antonio Commission, dated February 23, 1989, confirms an agreement whereby, for the consideration of \$1,000, the City of San Antonio will set up and remove bleachers for three parades.

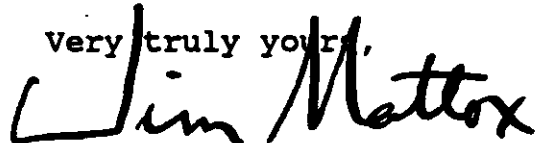
company). These persons and entities do not become governmental bodies within section 2(1)(F) of the Open Records Act by virtue of their use of city streets subject to city regulations and licensing requirements.

We conclude that Open Records Letter Ruling OR89-242 reached an incorrect result and accordingly, we overrule it. Ordinance 66194 of the City of San Antonio does not establish the Fiesta San Antonio Commission as an agency of the city or provide for transferring public funds to it. Thus, the ordinance does not make the commission a governmental body subject to the Open Records Act.

S U M M A R Y

An ordinance of the City of San Antonio that provides the Fiesta San Antonio Commission with various licenses and permits for parades and other events related to the annual Fiesta celebration does not establish the commission as a governmental body within sections 2(1)(C) or 2(1)(F) of the Open Records Act, V.T.C.S. art. 6252-17a. Open Records Letter Ruling OR89-242 is overruled.

Very truly yours,



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